STATE OF MICHIGAN

IN THE SUPREME COURT

DONNA DECOSTA,

Plaintiff-Appellant,

v

DAVID D. GOSSAGE, D.O., and
THE GOSSAGE EYE CENTER,

Defendants-Appellees.
_____/

SC No. 137480
COA No. 278665
LC No. 06-747-NM
[Hillsdale County CC]

137480
DFAE's sweep

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF FILED PURSUANT TO APRIL 24, 2009 ORDER

PROOF OF SERVICE

PLUNKETT COONEY,

BY: ROBERT G. KAMENEC (P35283)
Attorney for Defendants-Appellees
David D. Gossage, D.O., and
The Gossage Eye Center
38505 Woodward Avenue, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

TABLE OF CONTENTS

Page

INDEX TO AUTHORITIES

Page

CASES

STATUTES

COUNTER-STATEMENT OF THE QUESTION

I.

DID THE TRIAL COURT PROPERLY GRANT DEFENDANTS' MOTION FOR SUMMARY DISPOSITION WHERE PLAINTIFF'S NOTICE OF INTENT WAS NOT MAILED TO THE "LAST KNOWN PROFESSIONAL BUSINESS ADDRESS," AS MCL 600.2912b(2) REQUIRES?

Plaintiff-Appellant Donna DeCosta answers "no."

Defendants-Appellees David Gossage, D.O., and The Gossage Eye Center answer "yes."

The Hillsdale County Circuit Court answered "yes."

The Michigan Court of Appeals answers "yes."

COUNTER-STATEMENT OF FACTS

Defendants-Appellees David D. Gossage, D.O. and The Gossage Eye Center (collectively "Dr. Gossage" or "defendants") refer this Court to the corresponding section contained in their brief in opposition to application for leave to appeal, filed with this Court on December 30, 2008.

ARGUMENT

THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION FOR SUMMARY DISPOSITION WHERE PLAINTIFF'S NOTICE OF INTENT WAS NOT MAILED TO THE "LAST KNOWN PROFESSIONAL BUSINESS ADDRESS," AS MCL 600.2912b(2) REQUIRES.

A. Standard of review and supporting authority.

Dr. Gossage incorporates by reference the corresponding subsection of Argument I in his brief in opposition to application for leave to appeal.

B. Argument.

This Court instructed the parties to avoid mere restatements of their application papers. Defendants believe they have addressed each of the arguments presented by plaintiff in her application for leave to appeal, which cites a mere four cases for this Court's review and decision. Therefore, this supplemental brief highlights certain portions of the legal argument and factual record which support defendants' position, as well as addressing issues that plaintiff may not have raised (without the concession that they are ripe or preserved for appellate review), and questions raised by Justice Young in his concurring opinion of April 24, 2009.

1. The only notice of intent which predated expiration of the statute of limitations was not mailed to the "last known professional business address ... of the health professional or health facility who is subject to the claim," MCL 600.2912b(2).

The parties, the trial court, and the Michigan Court of Appeals, agree that the June 1, 2006 notice of intent addressed at David D. Gossage, D.O., F.A.O.C.O., and Gossage Eye Institute, was mailed to 46 S. Howell Street, Hillsdale, MI 49242 (**Exhibit B – Tabs 1 and**

2).[1] No evidence was presented that the 46 S. Howell Street address was the "last known professional business address" of the health professional (Dr. Gossage) or the health facility (Gossage Eye Institute) who are subjects of the claim, as required by MCL 600.2912b. Plaintiff speculated that the 46 S. Howell Street address may have been *another* professional business address for the respective defendants, but presented no supporting evidence, which leaves intact and unchallenged Dr. Gossage's affidavit that his practice and his business were located at 50 W. Carlton Road, Hillsdale, MI 49242, since February of 2004 (**Exhibit B – Tab 3, ¶¶3-6**).

The dissenting judge of the Michigan Court of Appeals placed weight in the lack of evidence "to suggest that plaintiff was aware that the new address was defendants' *sole* or *exclusive* address." (**Exhibit D**, Court of Appeals slip opinion (Jansen, J., dissenting, page 2) (emphasis supplied)). Plaintiff never suggested below that the address to which the subject notice of intent was sent was *another* "last known professional business address" of the defendants. On the contrary, no proofs were submitted on this point, other than those previously described from Dr. Gossage's affidavit. The 46 S. Howell Street address was not the last known professional business address of the defendants. The 50 W. Carlton Road address was the last known professional business address of the defendants. Under these facts, it matters not whether plaintiff was aware that the new address was the defendants' sole or exclusive address.

The dissent speculates that it was "eminently reasonable" to conclude that plaintiff honestly believed that the defendants simultaneously maintained two addresses – the previous address and the new address, since both were "'known' to plaintiff." Dissent, p 2.

---

[1] Exhibits referenced are those previously provided to the Court.

There are multiple flaws with this position. First, there is no evidence that the defendants maintained a professional address at 46 S. Howell Street during the relevant time. Anything else is speculation. Additionally, plaintiff's honest belief is academic to the calculus that must be employed by the Court. The defendants had a last known professional business address, and the notice of intent was not mailed to that address. That is the beginning and the end of the analysis. The dissent errs by implying that a plaintiff's honest belief governs the equation. Indeed, if a plaintiff honestly believed that a defendant physician had a last known professional address in Iowa, when in fact his last known business address was in Michigan, then the result is the same: the notice of intent mailed to Iowa was not sent to the last known professional business address.

Apparently the dissent puts weight in the word "known" in the phrase "last known professional business address," from which it determines that plaintiff's knowledge is the governor. This subjective test is not found in the statute and makes little sense under the rules of statutory construction. There is no "reasonable belief" standard that was provided by the Michigan Legislature in this portion of the notice of intent statute. This stands in contrast to other tort reform measures, such as affidavit of merit, by which the court is to consider the plaintiff's attorney's reasonable belief of whether the affiant meets the expert witness qualification standards under MCL 600.2169. *If* the Legislature intended to provide a "reasonable belief" standard in notice of intent, *then* it would have provided such a provision in the notice of intent statute, as it did provide in the affidavit of merit statute.

Assuming *arguendo* a "reasonable belief" or similar standard can be shoehorned from the unmodified use of the word "known," or otherwise derived from language that simply doesn't appear in the statute, plaintiff did not satisfy such a hypothetical test. As

indicated, plaintiff treated at the 50 W. Carlton address. She had been there over seven times. She had obtained her medical records from that address. (See e.g. **Exhibit C**, Tr. 5/16/07, pp 8-9, 32). Plaintiff knew better and apparently failed to so advise her attorneys (or she was not asked) (*Id.* at p 22) ("THE COURT: Did you ask Mrs. DeCosta where she picked up the records? MR. TURCK: Quite honestly, I don't know if we asked her where she picked up the records"). Nor did plaintiff through her attorneys consult the most readily-available source to determine the "last known professional business address," namely a simple telephone call (*Id.*).[2]

Both plaintiff and the dissenting judge at the Court of Appeals grafted a "reasonable belief" on the standard of "last known professional business address." (*Id.*, Tr. 5/16/07, pp 22-23; **Exhibit D**, Court of Appeals dissenting opinion, p 2). Each misreads the statute. Section 2912b *first* provides that the notice of intent shall be mailed to the last known professional business address or residential address of the health professional or health facility who is subject to the claim. It is only "*[i]f* no last known professional business address or residential address can *reasonably be ascertained*, notice may be mailed to the health facility where the care that is the basis for the claim was rendered." (Emphasis supplied). Here, the last known professional business address was known to plaintiff. How could she visit the 50 W. Carlton address, pick up her medical records at that address, and

---

[2] "THE COURT: Did you ever, you or your firm, ever pick up the phone and call down here and find Dr. - - call Dr. Gossage's office and ask him for the current address?

MR. TURCK: No ... ."

(*Id.* at 22).

actually be treated at that address with respect to the incident, without plaintiff knowing this was the "last known professional business address?" To state the proposition is to effectively refute it. There is no evidence that Dr. Gossage returned to his previous address, let alone evidence that plaintiff even knew of that address.

Equally important, even if the Court were to borrow the "reasonably be ascertained" standard of the second part of this statute, then plaintiff is left with the option of mailing the notice of intent to the health facility where the care was rendered, namely 50 W. Carlton, Hillsdale, MI. She did not do so. On either front, plaintiff comes up short.

Finally, the dissent in the Court of Appeals found significant that the defendants actually received plaintiff's initial notice of intent, which was forwarded from defendants' previous address to their new address. (Dissenting opinion, p 2). Recognizing that "actual notice" appears nowhere in the four corners of section 2912b, and that the Legislature has otherwise spoken on the test for the provision of notice of intent, namely mailing to the last known professional business address, the dissent invokes MCL 600.2301 to supplant the actual test with an "actual notice" test. A majority of this Court rejected use of section 2301 in the notice of intent context. *Boodt v Borgess Medical Center,* 418 Mich 558, 563, fn 4; 751 NW2d 44 (2008). That reasoning is adopted here. A notice of intent is neither a pleading nor a proceeding, the latter of which is eliminated by the fact that notice of intent is preparatory to and a condition precedent of filing a lawsuit. See the use of "shall" in section 2912b; *Roberts v Mecosta County Hospital,* (After Remand), 470 Mich 679, 681-682, 686; 684 NW2d 711 (2004).

2. The statute of limitations was not tolled by the subject NOI, or otherwise.

The only tolling argument presented by plaintiff is that the subject notice of intent was delivered to the last known business address and therefore tolls the statute of limitations under MCL 600.5856(c) (NOI tolling). As previously briefed, the subject notice of intent does not qualify for notice of intent tolling because it is noncompliant with the statutory mandate of section 2912b. This is discussed further in the following paragraphs. To the extent plaintiff now argues tolling under a different vehicle, or the Court is predisposed to consider such an argument, defendants object. As a general rule, appellate review is limited to issues decided by the trial court. *Bowers v Bowers,* 216 Mich App 491, 495; 549 NW2d 592 (1986).[3] In addition, given plaintiff's failure to raise any other tolling argument than notice of intent tolling, plaintiff has failed to present any additional tolling arguments on appeal, let alone provide legal authority for such positions. Accordingly, the position is abandoned. See *In re JS & SM,* 231 Mich App 92, 98; 585 NW2d 326 (1998); *Schellenberg v Rochester Elks,* 228 Mich App 20, 49; 577 NW2d 163 (1998).

In addition, it is important to note that there is no other tolling provision applicable to this case which would be recognized under Michigan law. See generally *Boodt, supra,* 481 Mich at 561-563. The rule of *Kirkaldy v Rim,* 478 Mich 551; 734 NW2d 201 (2007), with respect to filing-of-complaint tolling under MCL 600.5856(a), is inapplicable to a

[3] Review of issues not raised below would undermine the need for finality in litigation and conservation of judicial resources. It would often have the appellate court hold everything accomplished below for naught. It would also allow a party to raise a new issue on appeal where the party invited the alleged error below. See generally *Lyons v Jefferson Bank & Trust,* 994 F2d 716, 721 (CA 10, 1993).

notice of intent. *Boodt, supra.* So too is the rule of *Saffian v Simmons, DDS,* 478 Mich 8; 727 NW2d 132 (2007) inapplicable to a notice of intent.[4]

Justice Young has asked the parties to address two questions. The first is whether there is a theory under which a plaintiff may send a notice of intent to file a claim to an address *other than* the defendant's "last known business address" and still receive the benefit of NOI tolling. The answer is no such valid theory exists. MCL 600.5856(c) provides for tolling under certain circumstances only "[a]t the time notice is given *in compliance with the applicable notice period under section 2912b.*" Here, the notice of intent was not given in compliance with the applicable notice period under section 2912b, because it was not sent to the last known professional business address of the defendants. The legislative intent in this circumstance can easily be obtained by the actual words used by the Legislature, and accordingly further judicial interpretation is prohibited. *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002).[5]

Justice Young also asked the parties to address whether plaintiff receives the benefit of NOI statutory tolling with respect to defendant Gossage Eye Center, assuming for the

---

[4] *Saffian* stands for the proposition that a defendant's unilateral belief that an affidavit of merit fails to conform with the requirements of MCL 600.2912d does not constitute "good cause" for failing to respond timely to a medical malpractice complaint. *Saffian* is used by plaintiffs to legitimatize the complaint accompanying a defective affidavit of merit to obtain filing-of-complaint tolling under MCL 600.5856(a). As indicated in the text of this brief, such tolling is inapplicable in the context of a notice of intent, by which the failure to comply with notice of intent tolling vitiates the complaint. *Boodt, supra; Roberts, supra.*

[5] To the extent that the last known professional business or residential address cannot reasonably be ascertained, notice may be mailed to the health facility where the care that is the basis for the claim is rendered. MCL 600.2912b(2). Assuming these factors are met, which is not the case here, then notice would be given in compliance with the applicable notice period under section 2912b, and thus would arguably obtain tolling under these circumstances. To repeat, this is not the situation in this case, in which the last known professional business address was readily available and otherwise known to plaintiff.

sake of argument that the notice provision of MCL 600.2912b does not expressly apply to a professional corporation. First and foremost, these defendants believe that the NOI requirement applies to professional corporations, or any other entity sued on a vicarious liability/respondeat superior basis in the medical malpractice context. Pursuant to *Cox v Board of Hospital Managers for the City of Flint,* 467 Mich 1; 651 NW2d 356 (2002), and the Court of Appeals' decision of *Nippa v Botsford General Hospital*, 257 Mich App 387; 668 NW2d 628 (2003), *lv den'd* 469 Mich 1005 (2004), the professional corporation as employer stands in the shoes of the employee physician for whose actions the plaintiff seeks to recover vicariously against the employer. Assuming without admitting that there exists vicarious liability, the notice of intent provisions must apply equally to a professional corporation, or an employer, or anybody standing in the shoes of vicarious liability/respondeat superior, under this line of cases. Thus, notice of intent tolling would not be available to the claim made against Gossage Eye Center for the same reason that applies to Dr. Gossage: the subject notice of intent was not sent to the last known professional business address of the defendant.

In addition, the notice of intent requirement applies to a "claim," which involves an action alleging medical malpractice against a health professional or a health facility. See section 2912b(1) and (2). The "claim" is made against both defendants in this case, and accordingly the notice of intent requirements are mandatory as to both defendants. The failure to comply strips notice of intent tolling from the equation.

Inconsistent notice of intent treatment, including tolling, between a physician and a physician's professional corporation (or other relevant health facility) makes little sense. These defendants are unaware of any caselaw that requires a plaintiff to sue the principal's

agent, namely the physician, to proceed with the lawsuit against the principal itself, namely the professional corporation. In each instance, the defendants are sued for the same conduct, with the added requirement that there must be a showing of vicarious liability with respect to the principal. There is a "practical identity between a principal and an agent" acknowledged by Michigan law, *Cox, supra,* and *Al-Shimmari v Detroit Medical Center,* 477 Mich 280; 371 NW2d 29 (2007), which should transfer to the notice of intent context.

Finally, if notice of intent is hypothetically inapplicable to the professional corporation, notice of intent tolling would likewise be inapplicable under the terms of section 5856(c), previously discussed. Notice of intent requirements undoubtedly apply to the claim against Dr. Gossage. NOI tolling is unavailable, as discussed.

RELIEF

WHEREFORE, defendants-appellees David Gossage, D.O., and The Gossage Eye Center, request this Court deny leave to appeal, and otherwise leave intact the trial court's May 30, 2007 order granting defendants' motion for summary disposition, and issue any other relief deem warranted, including costs and attorney fees.

Respectfully submitted,

PLUNKETT COONEY

BY: _____

ROBERT G. KAMENEC (P35283)
Attorney for Defendants-Appellees
David D. Gossage, D.O., and
The Gossage Eye Center
38505 Woodward Ave, Suite 2000
Bloomfield Hills, MI 48304
Direct Dial: (248) 901-4068

DATED: June 5, 2009